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Reflections on the Judicial Legacy of the Honorable Carol Los Mansmann

Joy Flowers Conti

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I. INTRODUCTION

The Honorable Carol Los Mansmann touched the lives of many people. I am among those whose lives were affected in a positive manner by her spirit and grace. During the late 1970s and early 1980s, it was my good fortune to be a colleague of Judge Mansmann when she was a member of the faculty at the Duquesne University School of Law. As a young professor, I was able to discuss classroom issues with her and learn from her experiences. Her warmth and enthusiasm for the law were inspirational to all who knew her. After she was appointed to the federal bench, I was fortunate to continue my friendship with her and was present in Washington, D.C. at the time she took her oath before Justice Sandra Day O'Connor to become a federal district judge. Later, she was appointed to the United States Court of Appeals for the Third Circuit, and I was privileged to be present when she was sworn in as an appellate judge by Justice Sandra Day O'Connor. Throughout my legal career, I often would meet her for lunch and discuss issues relevant to our lives, including child rearing and the pressures and tensions of being a working mother. Carol, my friend, was always willing to listen and lend assistance in any way that she was able.

When I was involved in the process of becoming a federal district judge, she was encouraging, and it was a great void in my life when she died shortly before I was sworn in as a district judge. To say that she is greatly missed in my life would be an understatement. She still touches my life as a judge in many ways. As I was preparing to write these remarks about her legacy as a judge, I decided to focus on a significant decision she authored to see how it withstood the test of time. Since, from the time I was a professor, I have had an academic interest in business law, I chose a decision which had business connotations, *Ballay v. Legg Mason*

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Wood Walker, Inc.[1] My review of her written work was poignant and brought to mind the many ways in which she touched my life.[2]

II. THE IMPORT OF *BALLAY*

A. *The* Ballay *Decision*

In *Ballay*, certain investors had sued Legg Mason Wood Walker, Inc. ("Legg Mason"), a brokerage firm, seeking, among other things, to rescind the purchase of certain securities due to alleged oral misrepresentations. Whether rescission was an appropriate remedy turned on an issue of first impression before a federal appellate court: "whether section 12(2) of the Securities Act of 1933 affords a remedy to a buyer of securities in the secondary market."[3] In that decision, authored by Judge Mansmann, the United States Court of Appeals for the Third Circuit concluded: "the language and legislative history of section 12(2) demonstrate that Congress did not there intend to protect buyers in the aftermarket, and . . . [held] that section 12(2) provides a remedy to buyers of securities only in the initial distributions."[4]

The investors who sought rescission had purchased, through Legg Mason, securities of Wickes Company, Inc. ("Wickes"). The investors alleged that Legg Mason recommended Wickes as an investment presenting "little 'downside' risk."[5] Oral representations were allegedly made by one of Legg Mason's securities analysts based upon, among other things, a book value for Wickes that excluded good will. In fact, good will was not excluded in the book value calculation. Those misstatements were later corrected by Legg Mason because much of Wickes' book value included good will. The case went to trial and the jury found for the investors with respect to their § 12(2) claim.

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1. 925 F.2d 682 (3d. Cir. 1991), *cert. denied*, 502 U.S. 820 (1991).

2. She is still doing so. During the time I was preparing these materials, I was also drafting an opinion involving an appeal from a bankruptcy court decision. In doing legal research I found a decision which was controlling for the issue that was raised in the appeal. The decision, *In re* Cendant Corp. Prides Litigation, 235 F.3d 176 (3d Cir. 2000), was well written, and it was not surprising that it was authored by Judge Mansmann. In that opinion, the court of appeals recognized that a court has a duty to explain how it weighed equitable factors in determining whether late filings resulted from excusable neglect.

3. *Ballay*, 925 F.2d at 684.

4. *Id.*

5. *Id.* at 685.

Legg Mason sought judgment N.O.V., asserting that no violation of § 12(2) could be found under the law because that section did not apply to sales of securities in the secondary market. The district court rejected Legg Mason's argument because "the plain language of § 12(2) did not limit its application to initial distributions of securities and . . . the broad remedial purposes of the Securities Act of 1933 were not rigidly restricted to initial distributions."[6] Legg Mason appealed that unfavorable ruling to the United States Court of Appeals for the Third Circuit.

To resolve that issue Judge Mansmann looked first to the language of § 12(2), which read in pertinent part:

> *Any person who –*
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> . . . .
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> (2) *offers or sells a security* . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, *by means of a prospectus or oral communication, which includes an untrue statement of a material fact* or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of such untruth or omission,
>
> *shall be liable*, subject to subsection (b) of this section, *to the person purchasing such security* from him, *who may sue* either at law or in equity in any court of competent jurisdiction, *to recover the consideration paid for such security* with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.[7]

One question raised was whether the oral communication at issue in *Ballay* was an oral communication as contemplated by § 12(2). The key phrase which the court focused on was "by means of a prospectus or oral communication." The court construed the terms "prospectus" and "oral communication" as related terms and

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6. *Id.* at 686-87.
7. 15 U.S.C. § 77*l*(a)(2) (2000) (emphasis added).

held that a buyer could bring suit under § 12(2) for "material misrepresentations made in a prospectus or *in an oral* communication related to a prospectus or initial offering."[8]

To reach that conclusion the court utilized the statutory construction canon, *noscitur a sociis*.[9] Under that construction canon, a term is to be construed in light of accompanying terms in order to find its meaning. The court quoted from the Supreme Court's decision in *Jarecki v. G.D. Searle & Co.*:[10] "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."[11]

Applying that canon to the language in question, the court concluded that an oral communication had to be related to a prospectus because the term "prospectus" was the company the term "oral communication" kept.[12] The court refined its analysis by focusing on whether the term "prospectus" should have a broad or narrow meaning. It concluded that the term "prospectus" was a "term of art,"[13] and as a term of art, "prospectus" concerned sales of securities in initial distributions, not in the secondary market. That conclusion was supported by the use of the term "prospectus" in other sections of the Securities Act, i.e., §§ 5(b)(1) and 10.[14] A broad reading of the term "prospectus" in § 12(2) would have unintended consequences. If it had a broad meaning, a prospectus would refer to any written communication. Congress could not have intended to use the word "prospectus" in such a broad man-

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8. *Ballay*, 925 F.2d at 688 (emphasis added).

9. The phrase "noscitur a sociis" is "[a] canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." BLACK'S LAW DICTIONARY 1087 (8th ed. 2004). Justice Antonin Scalia described the canon in an essay discussing textualism:

> Textualism is often associated with rules of interpretation called the canons of construction – which have been widely criticized, indeed even mocked, by modern legal commentators. Many of the canons were originally in Latin, and I suppose that alone is enough to render them contemptible. . . . [A] frequently used canon is *noscitur a sociis*, which means, literally, "it is known by its companions." It stands for the principle that a word is given meaning by those around it. If you tell me, "I took the boat out on the bay," I understand "bay" to mean one thing; if you tell me, "I put the saddle on the bay," I understand it to mean something else . . . .

ANTONIN SCALIA, A MATTER OF INTERPRETATION 25-26 (Princeton University Press 1997).

10. 367 U.S. 303, 307 (1961).

11. *Ballay*, 925 F.2d at 688 (quoting *Jarecki*, 367 U.S. at 307).

12. *Id.*

13. *Id.*

14. *Id.* at 688-89.

ner because to do so would emasculate the use of § 10(b)[15] of the Securities and Exchange Act of 1934 (the "Securities Exchange Act").[16] To be actionable under § 10(b), a claim has to meet various elements such as "scienter, reliance and causation elements."[17] Broadly reading the term "prospectus" to include all written communications would make § 10(b) virtually superfluous because no one would rationally choose to sue under that section with its heightened pleading and proof requirements when it would be easier to establish liability under § 12(2). A broad interpretation of "prospectus" in § 12(2) also "would create an anomaly in that sellers in the aftermarket would be liable only for oral and not written misrepresentations because the term 'prospectus' is limited to initial offerings."[18]

The court also used the construction canon *noscitur a sociis* in reviewing the whole of the Securities Act of 1933 (the "Securities Act")[19] to support its decision. The court noted the purpose of the Securities Act was primarily "to establish safeguards for investors in batch offerings of securities by establishing registration and disclosure requirements designed in part to protect investors from fraud and to promote ethical standards of honest and fair dealing."[20] The court concluded that the Securities Act was intended by Congress "to regulate initial offerings."[21] Nothing was found in the legislative history or the structure of the Securities Act to indicate any intent of Congress to include secondary offerings under § 12(2).[22] The placement of § 12(2) between § 11 and § 13 of the Securities Act supported this conclusion because §§ 11 and 13 dealt with initial distributions.[23]

The court of appeals considered the buyers' argument that, in light of the Supreme Court's decision in *United States v. Naftalin*,[24] § 12(2) should be read consistent with § 17(a) of the Securities Act, which made criminal certain fraudulent conduct. In *Naftalin*, the Court found that § 17(a) was applicable to secondary markets and not limited to initial distributions. Judge Mans-

15. *Id.* at 689.
16. The Securities and Exchange Act of 1934, 15 U.S.C. § 78a-78nn (2000).
17. *Ballay*, 925 F.2d at 689.
18. *Id.*
19. The Securities Act of 1933, 15 U.S.C. § 77a-77bbbb (2000).
20. *Ballay*, 925 F.2d at 690.
21. *Id.*
22. *Id.*
23. *Id.* at 691.
24. 441 U.S. 768 (1979).

mann, writing for the court of appeals, opined that *Naftalin* was not controlling because § 17(a), which was interpreted in *Naftalin*, did not include the pertinent phrase at issue in *Ballay*—"prospectus or oral communication." *Naftalin*, on the other hand, dealt with an inherently broad phrase—"directly or indirectly . . . to obtain money or property by means of any untrue statement."[25] Moreover, there was legislative history which reflected Congress' intent to make § 17(a) applicable to secondary markets. In conclusion, Judge Mansmann stated: "the language and legislative history of section 12(2), as well as its relationships to sections 17(a) and 10(b) within the scheme of the [Securities and Securities Exchange] Acts, compel our conclusion that section 12(2) applies only to initial offerings and not to aftermarket trading."[26]

B. Conflict Among the Circuits Raised by Pacific Dunlop

In *Pacific Dunlop Holdings, Inc. v. Allen & Co.*,[27] the issue presented was similar to the issue presented in *Ballay*, i.e, "the scope of section 12(2) of the Securities Act."[28] In *Pacific Dunlop*, the buyer of certain securities, Pacific Dunlop Holdings, Inc. ("Pacific"), entered into an agreement with a corporation and certain of its shareholders to acquire stock of the corporation. The corporation whose stock was being acquired had earlier initiated an initial public offering of shares of stock, but that offering was unsuccessful. A registration statement had been prepared in connection with that offering, and, in the private transaction with Pacific, there was a representation that the information in the registration statement was truthful. The corporation whose stock was acquired by Pacific was "a holding company whose subsidiaries engage in the manufacture and sale of industrial and lead acid batteries and the recovery, smelting and sale of lead."[29]

Representations made in the stock purchase agreement included that the corporation and its subsidiaries were in compliance with environmental laws and regulations and that there were no pending or threatened governmental investigations. In fact, there were environmental claims asserted against the corporation. Pacific, the buyer, sought to rescind its stock acquisition.

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25. *Ballay*, 925 F.2d. at 691 (quoting 15 U.S.C. § 77q(a) (2000)).
26. *Id.* at 693.
27. 993 F.2d 578 (7th Cir. 1993), *cert. dismissed*, 510 U.S. 1160 (1994).
28. *Pacific Dunlop*, 993 F.2d at 579.
29. *Id.*

The sellers refused, and Pacific commenced a lawsuit asserting that misrepresentations in the stock purchase agreement warranted rescission under § 12(2) of the Securities Act. The district court dismissed the lawsuit based upon *Ballay*. The court of appeals in *Pacific Dunlop* rejected the *Ballay* holding that § 12(2) does not apply to aftermarket trading.[30] The court of appeals in *Pacific Dunlop* noted that, while the Supreme Court had not addressed the precise issue raised, there was some dicta that § 12(2) would apply to dealers, arguably implicating that § 12(2) would be applicable to aftermarket trading.[31] The United States Court of Appeals for the Second Circuit also concluded that *Ballay* was in conflict with decisions of the Courts of Appeals for the First and Tenth Circuits.[32]

The court of appeals in *Pacific Dunlop* reviewed the language of § 12, as well as the definition of the term "prospectus" in § 2(10) of the Securities Act. Based upon a reading of the Securities Act, the Court of Appeals for the Seventh Circuit determined that the word "prospectus" was "very broadly" defined.[33] It also concluded that "no single definition" of the term "prospectus" applied "throughout the [Securities] Act."[34] The court in *Pacific Dunlop* agreed with *Ballay*'s conclusion that an oral communication contemplated by § 12(2) had to be related to a prospectus in order to be actionable under that section.[35] The court disagreed, however, that § 12(2) would be limited to initial offerings, finding that the definition of the word "prospectus" set forth in § 2(10) of the Securities Act warranted a broad reading of "prospectus" to include sales in the secondary market.[36]

The Court of Appeals for the Seventh Circuit, like the court in *Ballay*, looked to legislative history. While noting that some of the legislative history would support the *Ballay* decision, it simply disagreed that legislative history required a narrow meaning of the term "prospectus."[37] The court found the decision of the Supreme Court in *Naftalin*[38] to be instructive because the Supreme

30. *Id.* at 580.
31. *Id.* at 581 (citing Wilko v. Swan, 346 U.S. 427 (1953)).
32. *See* Woodward v. Wright, 266 F.2d 108 (10th Cir. 1959); Cady v. Murphy, 113 F.2d 988 (1st Cir. 1940).
33. *Pacific Dunlop*, 993 F.2d at 582.
34. *Id.* at 584.
35. *Id.* at 588.
36. *Id.*
37. *Id.* at 592.
38. 441 U.S. 768 (1979).

Court there held § 17(a) of the Securities Act to encompass more than the initial offerings and "applied to the entire selling process."[39] Essentially for those reasons, the Court of Appeals for the Seventh Circuit disagreed with *Ballay* and found that § 12(2) would apply to secondary market trading as well as initial offerings.[40]

C. *Supreme Court Supports* Ballay's *Conclusion*

In 1995 the Supreme Court of the United States in *Gustafson v. Alloyd Co., Inc.*[41] resolved the conflict between *Pacific Dunlop* and *Ballay*.[42] *Gustafson* was a five-to-four decision in which the Court held that § 12(2) of the Securities Act does not provide a buyer a right of rescission in a private secondary transaction. The theory raised by the buyers in *Gustafson* was "that recitations in the purchase agreement are part of a 'prospectus'"[43] and thus are encompassed within § 12(2) of the Securities Act. The situation addressed in *Gustafson* began in 1989, when the shareholders of Alloyd, Inc. ("Alloyd"), a manufacturer of plastic packaging and

39. *Pacific Dunlop*, 993 F.2d at 593.

40. *Id.* at 595.

41. 513 U.S. 561 (1995).

42. In the interim period between the decision in *Ballay* and the decision in *Gustafson*, the majority of courts that considered the issue raised in *Ballay* followed the rationale of *Ballay*. *See* First Union Discount Brokerage Servs. Inc. v. Milos, 997 F.2d 835, 843-44 (11th Cir. 1993) ("[W]e are persuaded by the Third Circuit's reasoning [in *Ballay*] and hold that § 12(2) of the 1933 Act does not apply to aftermarket transactions."); Reed v. Prudential Sec. Inc., 875 F. Supp. 1285, 1292 (S.D. Tex. 1995) (recognizing that a minority of district courts held that § 12(2) applied to sales in the secondary market, but following the majority view, noting that "[c]ourts throughout the nation have followed the Third Circuit's reasoning in *Ballay*, including the United States Court of Appeals for the Eleventh Circuit, a circuit closely aligned with the Fifth Circuit"); Tregenza v. Great Am. Commc'ns Co., 823 F. Supp. 1409, 1418 (N.D. Ill. 1993) (noting the minority view, but concluding that "the Third Circuit authority [in *Ballay*] and other cases in this district holding that § 12(2) does not apply to after market purchases are both more numerous and more persuasive"); Bennett v. Bally Mfg. Corp., 785 F. Supp. 560, 562 (D.S.C. 1992) (referring to several decisions that had adopted a rational contrary to *Ballay*'s rationale, but citing *Ballay* and concluding "that the clear weight of authority supports [the] contention that section 12(2) does not apply to secondary market transactions"); Newman v. Comprehensive Care Corp., 794 F. Supp. 1513, 1525 (D. Or. 1992) (following *Ballay* because to do otherwise would "ignore the intention of Congress"); Budget Rent a Car Sys., Inc. v, Hirsch, 810 F. Supp. 1253, 1258 (S.D. Fla. 1992) (describing majority view, *Ballay*, and minority view, Farley v. Baird, Patrick & Co., Inc., 750 F. Supp. 1209 (S.D. N.Y. 1990), finding "the reasoning of the majority courts persuasive").

The minority view adopted by *Pacific Dunlop* was articulated in PPM Am., Inc. v. Marriott Corp., 820 F. Supp. 970, 978 (D. Md. 1993) (disagreeing "with the conclusion reached by the Third Circuit in *Ballay* concerning the 'structure' of the [Securities] Act" and stating that "[t]hat reasoning is based on little more than the location of section 12(2) in the [Securities] Act and ignores other provisions of the Act which reveal its true structure").

43. *Gustafson*, 531 U.S. at 564.

automatic heat sealing equipment, engaged KPMG Peat Marwick to facilitate a sale of their stock. Wind Point Partners II, L.P. ("Wind Point") agreed to purchase the shares of Alloyd through a newly formed entity.

Wind Point conducted due diligence, and ultimately the transaction was consummated. Included in the purchase agreement was a material adverse change clause. The purchase agreement "also provided that if the year-end audit and financial statements revealed a variance between estimated and actual increased value, the disappointed party would receive an adjustment."[44] A variance was found after the closing, and a year-end audit adjustment of $815,000 in favor of the buyers was warranted. Rather than accepting the adjustment, the buyers sought to rescind the purchase agreement under § 12(2) of the Securities Act. The buyers argued that the purchase agreement was in effect a prospectus and contained statements which gave rise to a right to rescission under § 12(2) of the Securities Act.

Suit was commenced by the buyers, and the district court, relying on *Ballay*, granted summary judgment in favor of the sellers. The buyers appealed that decision to the United States Court of Appeals for the Seventh Circuit, which found that the district court erred in relying on *Ballay*, by reason of *Pacific Dunlop* being the appropriate rationale. The court of appeals applied *Pacific Dunlop* to find that the word "prospectus" used in § 12(2) had a broad meaning covering "all written communications that offered the sale of a security."[45] The sellers' petition for a writ of certiorari to the Supreme Court was granted.

The Supreme Court noted that there was no conflict among the courts of appeals with respect to *Ballay*'s finding that an oral communication must be related to a prospectus in order to be actionable under § 12(2) of the Securities Act.[46] The conflict was whether the term "prospectus" should be broadly construed to include secondary market transactions.[47] The Court resolved the issue by looking to a consistent interpretation of the word "prospectus" within the Securities Act, and applying the principle "to construe statutes, not isolated provisions."[48] In doing so, the Court examined "§ 2(10), which defines a prospectus; § 10, which

44. *Id.* at 565.
45. *Id.* at 566.
46. *Id.* at 567-68.
47. *Id.* at 568.
48. *Gustafson*, 513 U.S. at 568 (citations omitted).

sets forth the information that must be contained in a prospectus; and § 12, which imposes liability based on misstatements in a prospectus."[49] The Court found that § 10 was limited to initial offerings and not secondary market transactions. The Court compared *Ballay*, which viewed the word "prospectus" in a narrow fashion, to *Pacific Dunlop*, which rejected *Ballay's* view that the word "prospectus" had to be limited as contemplated by §§ 10 and 12. The Court agreed with *Ballay*, concluded "that the term 'prospectus' must have the same meaning under §§ 10 and 12,"[50] and applied the statutory interpretation concept of construing terms consistently within a statute.

The Court noted its finding was buttressed by the structure of the Securities Act and commented that "[t]he primary innovation of the [Securities] Act was the creation of federal duties—for the most part, registration and disclosure obligations—in connection with public offerings."[51] The Court, like Judge Mansmann in *Ballay*, applied the doctrine of *noscitur a sociis*—"a word is known by the company he keeps."[52] It found the doctrine was appropriate in the context of § 12(2) of the Securities Act in order to avoid having too broad a meaning for the term "prospectus," which would make it "inconsistent with its accompanying words."[53] The Court also referred to its earlier decision in *Naftalin*,[54] which held that the statutory language and legislative history of § 17(a) of the Securi-

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49. *Id.*

50. *Id.* at 570.

51. *Id.* at 571.

52. *Id.* at 575.

53. *Gustafson*, 513 U.S. at 575. The Supreme Court recently utilized the canon of *noscitur a sociis*. In *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Supreme Court, in reversing a court of appeals' decision, held that a person who had tripped and fallen over a bag as a result of mail being negligently left on a porch could sue for damages. The Court held that the United States Postal Service was not subject to the sovereign immunity exception provided under the Federal Tort Claims Act, 28 U.S.C. § 1356 (2000). In making its finding, the Court construed the phrase "loss, miscarriage, or negligent transmission of letters or postal matter." The Court found that the terms "loss" and "miscarriage" limited "the reach of transmission." *Dolan*, 546 U.S. at 486. The Court quoted from *Jarecki*, 367 U.S. at 304, the same decision cited in *Ballay*. *See* Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffler, 537 U.S. 371, 384 (2003) (recognizing "the established interpretive canons of *noscitur a sociis* and *ejusdem generis*"; citing, among other decisions, *Jarecki*, 367 U.S. at 307); Virginia v. Tennessee, 148 U.S. 503, 519 (1803) ("It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. "Noscitur a sociis" is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words; and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.").

54. 441 U.S. 768 (1979).

ties Act justified a broad reading to extend that provision to cover secondary market trading. The Court found no comparable legislative history with respect to § 12(2) and concluded that "[t]he intent of Congress and the design of the statute required that § 12(2) liability be limited to public offerings."[55]

The Court reversed the decision of the United States Court of Appeals for the Seventh Circuit and held that the purchase agreement in issue was not a prospectus and, therefore, not covered by § 12(2).[56] In *Gustafson* it is easy to see the reflection of the themes set forth by Judge Mansmann in *Ballay*: to construe § 12(2) to be consistent with the object of the Securities Act, to read that section in context with the other sections prior to and following it, and to apply the canon of *noscitur a sociis* as a means of statutory construction in order to avoid having a meaning for the term "prospectus" broader than intended by Congress.

D. Application of Ballay *post-*Gustafson

1. Securities Law

Ballay has been cited as authority for the elements of a claim under § 12(2). In *Gasner v. Board of Supervisors*,[57] the Court of Appeals for the Fourth Circuit cited *Ballay* for recognizing the six elements that must be proven to establish a claim under § 12(2):

> (1) that defendant offered or sold a security; (2) by the use of any means of communication in interstate commerce; (3) through a prospectus; (4) by making a false statement or

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55. *Gustafson*, 513 U.S. at 578.

56. It should not go without mention that there were two vigorous dissents in *Gustafson*. One dissent was authored by Justice Thomas, in which Justices Scalia, Ginsburg, and Breyer joined, and the second dissent was authored by Justice Ginsburg, in which Justice Breyer joined. In his dissent, Justice Thomas looked to the definition of "prospectus" in § 2(10) of the Securities Act. Justice Thomas found the term "prospectus" to be broadly defined and therefore would not liken that term to a "mere 'term of art.'" *Gustafson*, 513 U.S. at 586 (Thomas, J., dissenting). Justice Thomas also found the interpretative tool *noscitur a sociis* was not applicable because that canon should only be used "in cases of ambiguity." *Id.* Justice Thomas did not view the definition of "prospectus" in § 2(10) of the Securities Act as being ambiguous. He regarded the majority's position as "motivated by its policy preference," *id.* at 594, which he felt was something that should be left for Congress, and not for the Court, to determine. Justice Ginsburg, while joining in Justice Thomas' dissent, also looked to the definition of the term "prospectus" in § 2(10) and to the legislative history of § 12(2), as well as numerous commentators who "agreed that section 12(2), like section 17(a), is not confined to public offerings." *Id.* at 601 (Ginsburg, J., dissenting). Like Justice Thomas, Justice Ginsburg would have left any narrowing of § 12(2) to Congress.

57. 103 F.3d 351 (4th Cir. 1990).

omission of material fact; (5) the untruth of which was known by defendant but not known by plaintiff; and (6) that caused plaintiff's damages.[58]

The primary import of *Ballay* in securities law, however, was the adoption of its limited reading of the term "prospectus" by the Supreme Court in *Gustafson*. While academics have criticized *Ballay* and *Gustafson*,[59] the analysis of *Ballay* utilized in *Gustafson* remains the applicable interpretation of § 12(2) today.

2. *Statutory Construction*

Ballay is generally referenced today for its statutory construction analysis. In the seventh edition of *Sutherland Statutory Con-*

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58. *Gasner*, 103 F.3d at 356.

59. The decision in *Ballay* was harshly criticized by the academic community. Professor Louis Loss and Professor Joel Seligman stated that the view adopted in *Ballay* to limit § 12(2) to initial offerings was "demonstrably wrong." LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 990 (3d ed. 1995). The criticism was originally contained in two articles: Louis Loss, *The Assault on Securities Act Section 12(2)*, 105 HARV. L. REV. 908 (1992), and Louis Loss, *Securities Act Section 12(2): A Rebuttal*, 48 BUS. LAW. 47 (1992). Professors Loss and Seligman would have applied the rationale of *Naftalin* to § 12(2) and extended the reach of § 12(2) to the secondary market. "In effect section 12(2) is to section 17(a) what section 12(1) is to section 5." LOSS & SELIGMAN, *supra*, at 990. They found that the difference in the phrases referred to in *Ballay* to distinguish § 12(2) and § 17(a) was not persuasive because the remedy in § 10(b) of the Securities Exchange Act is contemplated by Rule 10(b)(5), 17 C.F.R. § 240.10b-5, which was not adopted at the time of the enactment of the Securities Exchange Act. The professors were also not persuaded by the *noscitur a sociis* analysis relating to viewing § 12(2) in context with § 10. The professors commented that "[w]hen Congress intended that a prospectus should meet the very particular requirements of §10, it said so expressly." *Id.* at 992. Also unpersuasive to the professors was viewing § 12(2) in conjunction with § 11. What the professors saw as the error in *Ballay* was the failure to "*read the words* in the relevant provisions." *Id.* at 993. Notwithstanding such stern criticism, the Supreme Court in *Gustafson* found the *Ballay* rationale persuasive.

Academic commentators' criticism continued after *Gustafson*. In 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION (5th ed. 2005), Professor Hazen commented that the findings in *Gustafson* and *Ballay* were "unfortunate and erroneous." *Id.* § 7.6, at 116. Professor Hazen's view is that the error occurred because the term "prospectus" is not defined to have a restriction to initial offerings; rather, the term "'on its face,' applies to *all* written, television or radio offers to sell securities, including a sales confirmation, and a contract to sell." *Id.* at 116-17. Professor Hazen also noted that "[u]nfortunately, however, in a sharply divided five-to-four decision in Gustafson v. Alloyd Co., the Supreme Court adopted an unduly restrictive reading of the scope of the § 12(2a)(2) remedy. As a result of the *Gustafson* decision, it is clear that § (a)(2) will not be available for most day-to-day transactions." *Id.* vol. 4, § 1426, at 476-77. *See* MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDY § 6.04[1], at 6-11 – 6-13 (2007) (describing the authority prior to the decision in *Gustafson* and the consequences of the *Gustafson* decision, noting "[i]n any event, *Gustafson* precludes application of the Section 12(a)(2) right of action for private secondary (as well as private initial) transactions").

struction,[60] *Ballay* is cited as illustrative of the principle that "[i]n the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning."[61] For a decision to be recognized in *Sutherland Statutory Construction* is a matter of some distinction. Justice Antonin Scalia described that treatise in *A Matter of Interpretation*:

> There is to my knowledge only one treatise on statutory interpretation that purports to treat the subject in a systematic and comprehensive fashion – compared with about six or so on the substantive field of contracts alone. That treatise is Sutherland's *Statutes and Statutory Construction*, first published in 1891, and updated by various editors since, now embracing some eight volumes. As its size alone indicates, it is one of those law books that functions primarily not as a teacher or adviser, but as a litigator's research tool and expert witness – to say, and to lead you to cases that say, why the statute should be interpreted the way your client wants.[62]

Gustafson, whose rationale reflected Judge Mansmann's statutory analysis, is also cited in *Sutherland Statutory Construction*. It is the lead decision cited for the rule that "each part or section [of a statute] should be considered in connection with every other part or section to produce a harmonious whole."[63]

Professor Maxwell O. Chibundu[64] commented extensively on the *Ballay* decision in his article, *Structure and Structuralism in the Interpretation of Statutes*.[65] It was not so much the holding in *Ballay* that was significant; rather, the significance was the approach to statutory analysis taken by Judge Mansmann. Professor Chibundu, while noting the criticisms that had been raised with *Ballay*'s holding by various commentators,[66] found *Ballay*'s method of statutory interpretation to be noteworthy. Professor Chibundu reviewed the traditional methods of statutory interpretation, i.e., plain meaning and legislative history, and noted that

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60. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2007).

61. *Id.* § 47:29, at 474.

62. SCALIA, *supra* note 9, at 15.

63. SINGER & SINGER, supra note 60, § 46:5, at 190.

64. At the time Professor Chibundu wrote the article, he was an assistant professor of law at the University of Maryland School of Law.

65. 62 U. CIN. L. REV. 1439 (1994).

66. *Id.* at 1440-41.

while there were overtures to those statutory interpretation methods in *Ballay*, the primary focus of statutory construction in *Ballay* was on structure. He commented that

> [u]nhappiness with the use of legislative history, coupled with the acceptance of the reality that in certain circumstances the language of a statute is necessarily ambiguous, has resulted in the recommendation of and ready resort to structure as a tool of interpretation by many conservative judges. . . .[67] The methodology of utilizing structure to analyze a statute is the process of relying on the placement or juxtaposition of items of a statute one to another, or of a statute to other statutes. Such relationships may vary from the placement of words within a section, the placement of sections within a statute, or the placement of statutes within a code.[68]

Professor Chibundu noted the use of the *noscitur a sociis* canon could be problematical in some ways.[69] Professor Chibundu referred to the two aspects of structural analysis used in *Ballay*. The first aspect was the use of the canon of *noscitur a sociis*. The second aspect was to view the juxtaposition of ideas and the framework of their application. By positing any text as a subpart of a larger whole, the structural approach to interpretation proceeds in a tiered analysis, unveiling an item at a time in the belief that, ultimately, the meaning of the specific text will be brought out when a sufficient number of the layers of the legislative act have been examined.[70] Examining structure is arguably a better approach than looking to plain meaning and legislative history alone. Structure uses both those methodologies and also offers a true-to-life articulation of the forces at work that otherwise are obfuscated by the claim of subservience to "text" or to "legislative history" and that are ignored or unexplicated by the simple reference to "statutory purpose" or "policy."[71]

The ultimate conclusion by Professor Chibundu in terms of the significance of *Ballay* is that, while it utilized a structural analysis to ascertain legislative intent, a better approach would have been to use a structuralism methodology. That methodology "refers to a mode of employing structural analysis in the critique or under-

67. *Id.* at 1463.
68. *Id.* at 1464.
69. *Id.*
70. Chibundu, *supra* note 55, at 1529.
71. *Id.* at 1538.

standing of social institutions, experiences, and practices."[72] As an example of structural analysis, although not the structuralism approach envisioned by Professor Chibundu, the *Ballay* decision has withstood the test of time. Its approach to statutory analysis has been followed not only in *Gustafson*, but in other decisions.

A relatively recent decision by the United States Court of Appeals for the Third Circuit, *Securities and Exchange Commission v. J.W. Barclay & Co., Inc.*,[73] cited *Ballay* for two principles of statutory construction. In *J.W. Barclay*, the court of appeals addressed, among other things, whether a president of a defunct broker-dealer could be jointly and severally liable with the broker-dealer for an unpaid penalty. In administrative proceedings, the broker-dealer was found liable for violating § 17(a) of the Securities Exchange Act and ordered to pay a penalty. When the broker-dealer did not pay the penalty, the Securities and Exchange Commission ("SEC") commenced a suit against the broker-dealer under § 21(e) of the Securities Exchange Act.[74] The SEC also asserted that the former president of the broker-dealer should be found jointly and severally liable with the broker-dealer and requested that the former president be ordered to pay the penalty. Summary judgment was granted in favor of the SEC against the former president. The former president appealed to the United States Court of Appeals for the Third Circuit, arguing that the SEC lacked standing to bring the suit. In concluding that the SEC had standing, the court of appeals, citing *Ballay*, reflected on the need to avoid interpreting the statute "more broadly than its language and the statutory scheme reasonably permit."[75] The court of appeals looked at the scope of the statute primarily in light of the language of the section quoted and cited *Ballay*[76] for its "holding that the text of § 12(2) of the [Securities] Act did not create a cause of action for an oral misrepresentation in the secondary market."[77]

Judge Mansmann quoted *Ballay* in utilizing *noscitur a sociis* to construe another statute. In *Folger Adam Security, Inc. v. Dematteis/MacGregor, JV*,[78] the court of appeals in a decision authored

72. *Id.* at 1444 n.13.
73. 442 F.3d 834 (3d Cir. 2006).
74. 15 U.S.C. § 78u(e) (2000).
75. *J.W. Barclay*, 442 F.3d at 840 (quoting Pinter v. Dahl, 486 U.S. 622, 653 (1998), and citing *Ballay*, 925 F.2d at 690 n.11).
76. 925 F.2d at 687-89.
77. *J.W. Barclay*, 442 F.3d at 840.
78. 209 F.3d 252 (3d Cir. 2000).

by Judge Mansmann applied *noscitur a sociis* to construe a term used in § 363(f) of the Bankruptcy Code,[79] finding that the term "any interest" used in that section did not include affirmative defenses.[80]

In *In re Continental Airlines, Inc.*,[81] the court of appeals distinguished the analysis of *Ballay* in applying the canon of *noscitur a sociis*. In *Continental Airlines, Inc.* the court of appeals was called upon to construe § 1110 of the Bankruptcy Code.[82] The inquiry was whether leased aircraft were exempt from the automatic stay pursuant to 11 U.S.C. § 1110. Continental Airlines, Inc. ("Continental"), the debtor in that case, leased certain aircraft as a financing technique and not to acquire those airplanes. Continental argued that the exemption from the automatic stay provided in § 1110 should be limited to leases resulting from acquisition financing. The bankruptcy court found in Continental's favor and applied § 1110 only to acquisition leases.

On appeal, Continental argued that the canon of *noscitur a sociis* should be applied to determine that § 1110 was limited to acquisition leases, noting that § 1110 "applies to 'conditional sale contracts' and 'purchase money, equipment, security interests,'" which are acquisition devices.[83] The court of appeals disagreed, noting that the canon "is merely an aid in determining the intent of the drafters."[84] The language in § 1110 was found to be unqualified and not facially ambiguous. In so doing, the court distinguished *Ballay*.

It recognized that in *Ballay* the court "held that § 12(2) of the Securities Act of 1933 does not apply to sellers of securities in the secondary market."[85] It noted that *noscitur a sociis* was used to interpret the term "prospectus" which was a general term, but that it

> did so only in conjunction with an analysis of legislative history and policy concerns indicating Congress' clear intent. We noted that the term "prospectus" did not apply to secondary offerings, and that distinguishing between oral and written communication would make "no logical sense." . . . In addition,

79. 11 U.S.C. § 101 (2000).
80. *Folger*, 209 F.3d at 264.
81. 932 F.2d 282 (3d Cir. 1991).
82. 11 U.S.C. § 1110 (2000).
83. *Folger*, 209 F.3d at 288.
84. *Id.*
85. *Id.*

> we stressed that the legislative history and structure of the [Securities] Act, and its relation to the 1934 Securities Exchange Act, revealed Congress' clear intent to regulate only initial offerings.[86]

The court did not disavow the rationale of *Ballay*. As noted, it commented that the legislative history, policy, and structure of Congressional acts were important in applying the doctrine of *noscitur a sociis* to a general term.[87]

III. CONCLUSION

What can a friend say about the judicial wisdom of Carol Los Mansmann? Her work lives in her opinions and speaks for itself. It is noteworthy that *Ballay* was cited for its persuasive rationale in convincing a majority of lower courts to follow Judge Mansmann's interpretation of § 12(2). The United States Supreme Court in *Gustafson* adopted the conclusion of *Ballay*. The structural analysis utilized in *Ballay* to interpret § 12(2) of the Securities Act is a testament to Judge Mansmann's intellect and wisdom.

Remembering Carol and having this opportunity to reflect on her judicial legacy was, as noted previously, poignant and meaningful for me as her friend and as a jurist. The greatest legacy of the Honorable Carol Los Mansmann, however, lies not only in remembering her as the author of significant opinions; but also in remembering her as a mentor for both lawyers and judges. Her memory lives in the lawyers and judges who had the good fortune to know her. I am thankful to have been one of the privileged to be mentored by Judge Mansmann. She is and will continue to be greatly missed.

86. *Id.* at 289 (citations omitted).
87. *Id.*